BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, delivered orally December 29, 1939, appears in the record at pages 205-9. It was not reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in the record at pages 442-8 and in the official Federal Reporter in 118 Fed. 2nd 867.

Jurisdiction.

In the interest of brevity, the subject having been covered in the Petition for Writ of Certiorari, *supra,* pages 4-5, we refer the court to that statement.

Statement of the Case.

To dispense with the necessity of repeating here the essential facts and issues, we hereby adopt that statement contained in the Petition for Writ of Certiorari.

Specification of Errors.

The errors which petitioner will urge if the Writ of Certiorari herein prayed is granted are that the Circuit Court of Appeals for the Seventh Circuit erred:

1. By construing the license contract of August 10, 1931, in a manner which, by its very nature, evidenced its ambiguity without all the facts and circumstances surrounding the execution of the document to aid in its construction.

2. By denying petitioner's Petition for permission to make application to the District Court for leave to file a

Bill in the nature of a Bill of Review, the substance of which (a) called to the court's attention the error of its previous decision, and (b) showed the court for the first time the fact that there was in existence evidence which it should have had before it before attempting to construe the contract, and which had been withheld from the record by way of Petition for Rehearing by the unauthorized, wilful and fraudulent disregard of the rights of petitioner, by petitioner's former counsel, and (c) that there was no factual foundation in truth for the findings upon which the Circuit Court of Appeals based its previous decision.

Summary of Argument.

Petitioner's "Reason Relied on for Allowance of Writ," set forth in the Petition for Writ of Certiorari, (*supra*, page 6) is hereby adopted as a summary of its argument.

ARGUMENT.

Point I.

THE DELIBERATE DISREGARD OF THE FUNDAMENTAL LEGAL PRINCIPLES APPLICABLE TO THE CONSTRUCTION OF AMBIGUOUS CONTRACTS, AND THE REFUSAL BY THE CIRCUIT COURT OF APPEALS TO SUBSEQUENTLY ALLOW FRAUDULENTLY SUPPRESSED EVIDENCE TO BECOME A PART OF THE RECORD TO AID IN THE CONSTRUCTION OF THE CONTRACT IN QUESTION IS SUCH AN UNFAIR AND PREJUDICIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND IN SUCH COMPLETE DISREGARD OF ESTABLISHED LAW BY THAT COURT AS TO DEMAND THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT TO PREVENT A GROSS MISCARRIAGE OF JUSTICE.

The following prefatory statements of law, while not controlling the main point, are indispensable to a full appreciation of the main issues involved in the Petition for Writ of Certiorari.

The trial court ruled that the license contract of August 10, 1931, was not ambiguous and that parol evidence was not necessary to aid in determining the intention of the parties (Rec. 205). Upon appeal, the Circuit Court of Appeals undertook to construe the contract in a manner diametrically opposed to the construction placed upon it by the trial court (118 Fed. 2nd 867). There had been no opportunity for petitioner to introduce evidence of the facts and circumstances surrounding the execution of the contract, since the trial court ruled the contract unambiguous. The Circuit Court of Appeals used what evidence respondent had offered, over objection of petitioner (Rec. 66), to arrive at its decision.

As a result, there stands upon the record of this case, a decision arrived at by unlawful means, and a construction of the license contract utterly foreign to the intent of the parties to the contract.

Point I-A. When two courts hold to opposite views in an attempt to construe a written instrument, the language out of which such difference of opinion arises is ambiguous.

The ambiguity of the license contract was established when the Circuit Court of Appeals attempted to place a construction upon the contract inconsistent with that of the trial court. In the case of *Lock Joint Pipe Co.* v. *Melber,* 234 Fed. 319, at page 323, that court said:

> "It is urged by the defendants that the reservation clause of the assignment is so clear in expression that it is susceptible of but one construction, which is the construction placed upon it by the defendants, and that its language is wholly without ambiguity and raises no question whatever. To this view was the learned trial judge so clearly inclined that he dismissed the bill without hearing the defendant and without leaving the bench. Yet, if the case had originally been submitted to us, we feel that we would have been equally prompt in deciding it the other way. Obviously, therefore, the language does raise a question. Every question has two sides. In some, one side is so prominent according as it is viewed, that it obscures the other. Curiously enough, the question in this case must be of that kind, for when two courts hold so clearly to opposite views there must be a question with two distinct sides, and the language out of which such a question arises must be ambiguous indeed."

In the case of *Thompson* v. *Akin,* 81 Ill. App. 62, ambiguity is defined as follows:

"A statute or any sentence, clause or word is 'ambiguous' when it is capable of being understood by reasonably well-informed persons in either of two or more ways."

Point I-B. By reason of the doubt arising as to the true sense and meaning of the words employed, the sense and meaning of the language will be investigated and ascertained by evidence dehors the instrument, and the court in order to place itself as nearly as possible in the situation of the parties at the time will consider all the facts and circumstances leading up to and attending the execution of the contract.

The ambiguity of the contract having been established by the opposed construction of the two courts, the Circuit Court of Appeals should have remanded the case for introduction into evidence all the facts and circumstances leading up to and attending the execution of the contract. In no other way could that court be able to place itself "as nearly as possible in the situation of the parties at the time" as required by an unbroken line of State and Federal decisions.

The reason for this is obvious, for if a contract is unambiguous, its construction is a question of law and extrinsic evidence is not admissible to explain or vary the expressed terms of the instrument. However, where the contract is capable of more than one interpretation, it is ambiguous and before the court can confidently say what the intent of the parties was, it must be in possession of all of the facts in order that the language used may be construed in the light of the situation of the parties at the time that language was employed. In a very old Illinois case, *Doyle, et al.*, v. *Teas, et al.*, 4 Scammon 202, we quote from page 256:

"Where the language is of such a character as to show that the parties had a fixed and definite meaning

which they intended to express, and used language adequate to convey that idea to persons possessed of all of the facts which they had in view at the time they used the language, it then becomes the duty of the court to remember those facts, if need be, by parol proof, and thus, as far as possible, by occupying the place of the parties employing the expressions, ascertain the sense in which they were intended to be used."

The following authorities support the expression of the Supreme Court of Illinois in the *Doyle* v. *Teas* case above cited:

Hayes v. *O'Brien,* 149 Ill. 403.
Close v. *Browne,* 230 Ill. 228.
Hedrick v. *Donovan,* 248 Ill. 479.
Higinbotham v. *Blair,* 308 Ill. 568.
Weber v. *Adler,* 311 Ill. 547.
Nelson v. *Colgrove & Co. State Bank,* 354 Ill. 408.
Board of Education v. *City of Rockford,* 373 Ill. 442.
Marx v. *American Malting Co.,* 169 Fed. 582.
Ryan v. *Ohmer,* 244 Fed. 31.
General Supply Co. v. *Marden, Orth & Hastings Co.,* 276 Fed. 786.
Corbett v. *Winston Elkhorn Coal Co.,* 296 Fed. 577.

We submit that it was error for the Circuit Court of Appeals to presume to undertake construction of the license contract without the aid of extrinsic evidence with both sides being given an opportunity to offer proof.

However, the merits of this Petition do not rest upon this error previously committed by the Circuit Court of Appeals, but rather upon an abuse of discretion indulged in by the Circuit Court of Appeals after considering the merits of the proposed complaint attached to petitioner's

Amended Petition. It is in the light of the suppressed evidence, after being called to its attention, that the previous actions of the Circuit Court of Appeals measure the abuse of discretion complained of in this Petition for Writ of Certiorari.

Point I-C. The Circuit Court of Appeals, having predicated its decision upon a misapprehension of the true facts, there was imposed upon petitioner's former counsel the duty to advise that court of the existence of the evidence which would destroy the court's misapprehension of the truth, and the suppression of the truth by petitioner's former counsel was as reprehensible as the utterance of the false.

It is a lawyer's duty to the court to aid in the ascertainment of the truth in order that justice may be done between the parties.

United States v. *Newman, et al.*, 25 Fed. 2nd 357.
People v. *Chamberlain*, 242 Ill. 260.
People v. *Payson*, 215 Ill. 476.
People v. *Moutray*, 166 Ill. 360.
People v. *Case*, 241 Ill. 279.

A fair statement of the general rule pertinent to the suppression of truth constituting a falsehood is contained in the case of *Copper Process Co.* v. *Chicago Bonding & Insurance Co.*, 262 Fed. 66, wherein it is stated at page 73:

> "Fraud may be committed by suppression of the truth as well as by the suggestion of falsehood. 12 R.C.L. 305, and cases. But the law distinguishes between passive concealment and active concealment, the distinction being that in active concealment there is employed a purpose or design. As a general rule, to constitute fraud by concealment or suppression of the truth, there must be something more than mere silence or a mere failure to disclose known facts. There must be some occasion or some circumstance which

imposes on one person the legal duty to speak, in order that another dealing with him may be placed on an equal footing. Then a failure to state a material fact is equivalent to concealment of the fact and amounts to fraud equally with an affirmative falsehood. Citing cases."

Concurring in this statement of the law also is *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, and *Tyler* v. *Savage*, 143 U. S. 79.

Point I-D. The petitioner having been prevented from presenting all of its case to the court by fraud practiced upon it, the Circuit Court of Appeals abused its discretion by denying petitioner's petition for permission to make application to the District Court for leave to file a bill in the nature of a bill of review.

The test of the sufficiency of the circumstances for which a court of equity will grant relief from a judgment are recognized and stated in the case of *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. At page 65, the court said:

"Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree

and open the case for a new and a fair hearing. See, Wells, *Res Adjudicata,* sec. 499; *Pearce* v. *Olney,* 20 Conn. 544; *Wierich* v. *De Zoya,* 7 Ill. (2 Gilm.) 385; *Kent* v. *Ricards,* 3 Md. Ch. 396; *Smith* v. *Lowry,* 1 Johns. Ch. 320; *De Louis* v. *Meek,* 2 Green (Iowa) 55.

In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

Concurrence in that statement may be found in the following cases:

Truly v. *Wanzer,* 5 How. 141.
Vance v. *Burbank,* 101 U.S. 514.
Pacific RR. of Missouri v. *Missouri Pacific RR. Co.,* 110 U.S. 504.
Marshall v. *Holmes,* 141 U.S. 588.
Hatch v. *Ferguson,* 57 Fed. 966.
Miller v. *Perris Irrigation District,* 85 Fed. 693.
Deweese v. *Smith,* 106 Fed. 438.
King v. *McAndrews,* 111 Fed. 860.
LeMarchel v. *Teagarden,* 152 Fed. 662.
Nelson v. *Meehan,* 155 Fed. 1.
Riverside Oil and Refining Co. v. *Dudley,* 33 Fed. 2nd 749.
Fiske, et al. v. *Buder,* 125 Fed. 2nd 841.

Discussing the nature of the fraud recognized as a ground for relief, the Circuit Court of Appeals said in the case of *Fiske, et al.* v. *Buder,* 125 Fed. 2nd 841, at page 849:

"Fraud which prevents a person from presenting an available defense is proper ground for relief against a judgment. Footnote 12, 31 Am. Jr. Article 654, page 232. If the fraud really prevents the complaining party from making a full and fair defense it will jus-

tify setting aside a decree, whether extrinsic or intrinsic."

It must also be borne in mind that the proposed complaint alleges that after the rendition of the decree of the Circuit Court of Appeals on March 6, 1941, petitioner requested its former counsel to make the evidence in that counsel's possession available to the court to prove the error of its decision. This, said former counsel refused to do. After this refusal, petitioner went to the chambers of the United States Circuit Court of Appeals and the Honorable Evan A. Evans of that court agreed to grant an audience to petitioner and its counsel and respondent and his counsel, but that petitioner's counsel refused to attend such a conference (Supp. Rec. 101).

Point I-E. The petitioner has not been guilty of laches in asserting its rights.

The respondent, Roquemore, and the Addressograph-Multigraph Corporation continue to manufacture and sell joggers embodying plaintiff's patents, in violation of the intention of the parties at the time of the execution of the license contract on August 10, 1931, so that there has been no detriment or alteration in the situation of the parties of which the respondent may complain.

Laches is not measured by lapse of time, but a change of situation during neglectful repose, rendering it inequitable to afford relief. (*O'Brien* v. *Wheelock*, 184 U.S. 450)

In the case of *Des Moines Terminal Co.* v. *Des Moines Ry. Co.*, 52 Fed 2nd 616, at page 630, it is said:

> "Laches is an inexcusable delay in asserting rights. Mere lapse of time does not constitute laches. To wait an unreasonable time before seeking relief from a known wrong may amount to laches. It is to be determined by consideration of justice, and that is dependent upon the circumstances of each particular case."

Point I-F. It is within the power of this court to direct the remandment of this case to the Circuit Court of Appeals with directions to grant permission to petitioner to make application to the District Court for leave to file the proposed bill in the nature of a bill of review.

It is within the supervisory and discretionary power of this court to direct the remandment of this case for the purpose of granting to petitioner leave to file the proposed complaint.

In the case of *Levy* v. *Arredondo,* 12 Pet. 218, 9 L. Ed. 1062, action was instituted for breach of certain contracts. There was diversity of view among the Justices of the Supreme Court as to the possible effect of these contracts, and it was directed that the cause be remanded with directions that the contracts be produced and evidence given of the contents of them. The basis of this action was that "this court have not sufficient materials before them whereon to found any final and satisfactory decree; and that justice recognizes that the cause should be opened in the court below for further proofs." (p. 219)

In the case of *Ballard* v. *Searls,* 130 U.S. 50, 9 S. Ct. 418, 32 L. Ed. 846, the entire proceeding was remanded because of a change in conditions subsequent to the trial. That rule was confined to instances in which "new matter discovered could not be evidence in any matter at issue in the original cause, and yet clearly demonstrated error in the decree." It should be noted the similarity of the case before this court on petition that the new matter could not have been evidence in the trial court since that tribunal ruled that the contract of August 10, 1931, was not ambiguous and evidence of the character now sought to be introduced was, therefore, not admissible.

In the case of *Marshall* v. *Holmes,* 141 U.S. 589, 35 L. Ed. 870, at page 596, the court said:

> "While as a general rule a defense cannot be set up in equity which has been fairly and justly tried at

> law, and although in view of the large powers now exercised by courts of law under their judgments, a court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is a settled doctrine that 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or neglect in himself or his agents, will justify an application to a court of chancery.' Citing cases."

Reduced to its simplest terms, if the Circuit Court of Appeals had followed the law in the first instance, and had ruled that it did not understand the license agreement as the trial court had interpreted it, and that, therefore, all available evidence surrounding the circumstances and situation of the parties at the time the agreement was executed should be in evidence, the ultimate state of the facts would be:

(a) That no third sized jogger was made by petitioner for American Multigraph Company, petitioner's 1121 jogger being the size used upon the #57 press. (Supp. Rec. 89-90).

(b) The parties never intended that any sizes might be used or sold by the American Multigraph Company except the No. 112 and 1121 joggers. (Supp. Rec. 92-93).

(c) The No. 112 jogger and the M-24 jogger were of identical dimensions except for the height of the unpatentable frame of both. (Supp. Rec. 90-91).

(d) Petitioner never sold or intended to sell out its business to American Multigraph Company by the execution of the license contract of August 10, 1931. (Supp. Rec. 92).

(e) Petitioner had no knowledge of infringements until 1936; that the matter was immediately placed in the hands of counsel; that negotiations for settlement extended through 1936 until institution of suit in 1939. (Supp. Rec. 99-100).

(f) Respondent would be estopped to assert the differentiating elements claimed for the accused device. The alleged differentiating features of the accused device were first perfected and made a part of the No. 112 and 1121 joggers by petitioner, and were a part of the No. 112 and No. 1121 joggers when the license contract of August 10, 1931, was executed. (Supp. Rec. 96-99).

(g) Defendant's exhibits 8, 9, 10 and 11 which were deleted by stipulation of petitioner's former counsel show conclusively that the alleged departure in the actuating assembly on the accused device is identical with and incorporated on the deleted blueprints; that, therefore, the alleged fatal difference in the actuating assembly is the identical actuating assembly that petitioner licensed the American Multigraph Company to manufacture by the license contract of August 10, 1931. (Orig. Rec. 147, Supp. Rec. 82-83, 90-91).

(h) The only difference between models 112 and 1121 of petitioner's joggers licensed to American Multigraph Company was a difference in size. (Orig. Rec. 76).

If this court will compare the foregoing statements with the findings of fact upon which the original decision of the Circuit Court of Appeals was predicated, it will be seen that every finding of fact material to the conclusion arrived at by the Circuit Court of Appeals is met and refuted by the suppressed evidence.

Nor are the hands of a court of equity tied to prevent such a miscarriage of justice. The circumstances of this case are so demanding of the relief of a court of equity that the defendant, certainly not having been hurt by

delay, will not be heard to obstruct the efforts of plaintiff-petitioner to have justice done in this case. It was very properly stated in the case of *Kershaw, et al.* v. *Julien,* 72 Fed. 2nd 528, at page 530:

> "But, counsel argue, rigid rules of law intervene to prevent the righting of this wrong. If true, it is a grave reproach to our jurisprudence. But it is not true; rules of law are not as inflexible as counsel assert; if the decided cases afford no precedent for the redress of the wrong here perpetrated, then a precedent should now be established. The genius of the common law is its flexibility, a virtue arising from the determination of the courts of long ago that justice should be done."

CONCLUSION.

The hands of this court are not tied to rectify these abuses complained of herein. The fact that the former decree is cloaked with the dignity of a final judgment of the court below does not purge it of the fact that it is based upon a misapprehension of the law and facts, the true facts fraudulently kept from the court crying the injustice of the result.

We do not understand our system of jurisprudence to be so steeped in canons of procedure that the purpose of its existence is forgotten.

We respectfully submit that the petitioner, having been prevented from presenting all of its evidence by the unexplained and incomprehensible conduct of its former counsel, should be given that opportunity so that the ultimate decision may reflect the truth and a proper application of legal principles thereto.

For all of the foregoing reasons, and by virtue of the wealth of authorities herein cited, we respectfully submit that the denial of petitioner's request for permission to make application to the United States District Court for the Northern District of Illinois, Eastern Division, for leave to file the proposed Bill in the nature of a Bill of Review was an abuse of discretion by the United States Circuit Court of Appeals, Seventh Circuit, and the Writ of Certiorari herein prayed should be granted.

Respectfully submitted,

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Motion for leave to use the certified transcript of record in Case No. 90, October Term 1940, of this court, in lieu of supplying an additional certified transcript of proceedings to that date.

Petitioner, Jogger Manufacturing Corporation, respectfully prays that an order be entered in this proceeding granting permission to petitioner to use the certified transcript of record heretofore filed in this court in case No. 90, October Term 1940, entitled *Jogger Manufacturing Corporation* v. *Wendell H. Roquemore, doing business as Multigraph Sales Agency,* in lieu of supplying a new certified transcript of record of proceedings covered by said certified transcript, and that the printing thereof be dispensed with pending consideration of the foregoing Petition for Certiorari herewith presented.

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